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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/035,863	12/31/2001	Bruce Robie	Implex-13	4928

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EXAMINER

PHILOGENE, PEDRO

ART UNIT	PAPER NUMBER
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3732

DATE MAILED: 08/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/035,863

Applicant(s)

ROBIE ET AL.

Examiner

Pedro Philogene

Art Unit

3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 06 August 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 2-14 and 18-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 15-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 06.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

***Election/Restrictions***

Applicant's election without traverse of claims 1,15-17 in Paper No. 08 is acknowledged.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims, 1,15-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Wilhelmy (5,722,977).

With respect to claim 1, Wilhelmy discloses an instrument system (8) for preparing a disc space between adjacent vertebral bodies to receive a repair device, the instrument system comprising: at least one distractor (15) including a tapered body section (17) for distracting the vertebral bodies in a manner that restores natural lordosis of the lumbar and cervical spines; as set forth in column 5, lines 44-67; column 6, lines 1-67.

With respect to claim 15, Wilhelmy discloses a distractor (8) for use in a system that prepares a disc space between adjacent vertebral bodies to receive a repair device, the distractor (15) comprising a tapered body section (17) for distracting the vertebral bodies in a manner that restores natural lordosis of the lumbar and cervical spines; as set forth in column 5, lines 44-67; column 6, lines 1-67.

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With respect to claims 16,17, Wilhelmy discloses a connector (16) and a detent (28).

Claims, 1,15-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Kuslich et al. (5,947,971).

With respect to claim 1, Kuslich et al disclose an instrument system for preparing a disc space between adjacent vertebral bodies to receive a repair device, the instrument system comprising: at least one distractor (54) including a tapered body section (58) for distracting the vertebral bodies in a manner that restores natural lordosis of the lumbar and cervical spines; as set forth in column 11, lines 5-40; column 14, lines 1-7.

With respect to claim 15, Kuslich et al. disclose a distractor (54) for use in a system that prepares a disc space between adjacent vertebral bodies to receive a repair device, the distractor (54) comprising a tapered body section (58) for distracting the vertebral bodies in a manner that restores natural lordosis of the lumbar and cervical spines; as set forth in column 11, lines 5-40; column 14, lines 1-7.

With respect to claims 16,17, Kuslich et al disclose a connector (57) and a detent (55).

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

6,224,599	05-2001	Baynham et al.
6,440,139	08-2002	Michelson

6,210,412	04-2001	Michelson
6,589,247	07-2003	McGahan et al
5,484,437	01-1996	Michelson

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (703) 308-2252. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0858.

Pedro Philogene  
August 22, 2003

  
PEDRO PHILOGENE  
PRIMARY EXAMINER